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IN THE

Supreme Court of the United States

October Term, A. D. 1968

No. [redacted] 195

CHEMICAL TANK LINES, INC., a corporation, *Appellant*

v.

EDWARD W. HOLSTINE, *Appellee*

APPEAL FROM THE SUPREME COURT OF WEST VIRGINIA

MOTION TO DISMISS OR AFFIRM

ROBERT H. C. KAY
511 Charleston National
Bank Building
Charleston, West Virginia

STANLEY E. PREISER
1012 Kanawha Boulevard, East
Charleston, West Virginia
Counsel for Appellee

JOHN S. HAIGHT
511 Charleston National
Bank Building
Charleston, West Virginia

GEORGE S. SHARP
511 Charleston National
Bank Building
Charleston, West Virginia
Of Counsel

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IN THE

Supreme Court of the United States

October Term, A. D. 1967

No. 1533

CHEMICAL TANK LINES, INC., a corporation, *Appellant*

v.

EDWARD W. HOLSTINE, *Appellee*

ON APPEAL FROM THE SUPREME COURT OF WEST VIRGINIA

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal, or, alternatively, to affirm the order of the West Virginia Supreme Court of Appeals below summarily on the grounds that the decision was clearly in accord with controlling constitutional principles.*

*A copy of Appellee's brief is filed with this motion and is lodged with the Clerk of this Court.

1. The facts alleged in the Jurisdictional Statement are not correct** in that:

> A. Appellant alleges (p. 7, Jurisdictional Statement) that the bond for $5,000.00 required by the order of the Circuit Court of Kanawha County, West Virginia, was "a cost bond for Appeal to the Supreme Court of Appeals for West Virginia", when, as a matter of fact, it was a suspending bond to suspend the order of

**Apology is made for the length of this motion and appendix but it is made necessary to correctly establish the facts.

said Circuit Court for a period of 60 days. Appendix, p. 3(a), for the terms of said bond.

B. Appellant alleges (p. 2 and 3, Jurisdictional Statement) that, "Following refusal by that Court (Circuit Court of Kanawha County, West Virginia) to assume jurisdiction, a Petition for Writ of Error or Appeal and also for a Writ of Supersedeas was filed in the Supreme Court of Appeals of the State of West Virginia." The petition of Appellant to the Supreme Court of Appeals was "Petition for Appeal or Writ of Error and Supersedeas." Appendix, p. 4(a)-5(a) for copy of petition showing prayer and alleged errors assigned. The order of the Supreme Court of Appeals of West Virginia recited "the appeal and supersedeas prayed for is granted." Only one bond was required. See Appendix, p. 7(a).

C. The statement in the Jurisdictional Statement (p. 19) that, "The giving of a bond for costs by Appellant on May 10, 1967, was sufficient here to act as an appeal bond, because the amount of $5,000 was adequate," is not correct for the bond of May 10, 1967, for $5,000.00 was not a bond for costs on appeal but a "suspending bond to suspend the order of the Circuit Court of May 10, 1967." (Appendix, p. 1(a) for Court order, and p. 2(a) for suspending bond).

D. It is not correct as stated in Jurisdictional Statement, p. 3, that, "An Appeal and Writ of *Supersedeas* were thereafter granted on September 11, 1967, *the latter conditioned according to law.*" (Italics ours). The *bond*, not the supersedeas, was required by the order of September

11, 1967, to be "conditioned according to law." The appeal and supersedeas were not to take effect until such bond was given by Appellant. Appendix, p. 7(a).

E. It is not correct, as stated on p. 7, Jurisdictional Statement, that, "Appellant herein contended in the trial and Appellate Courts that such a ruling was in violation of its constitutional rights under the Constitutions of both the State of West Virginia and the United States, and further that such holding constituted an unlawful burden on Interstate Commerce." (a) Nowhere in the 20 assignments of alleged error presented by Appellant to the Court of Common Pleas on November 12, 1965, and found on pages 213 to 219 of the record, is there any mention of the violation of any constitutional rights of the Appellant, either state or federal. (b) Nowhere in the 5 assignments of alleged error in Appellant's petition for an appeal to the Circuit Court of Kanawha County, West Virginia, is there any mention of the alleged violation of Appellant's constitutional rights, either state or federal. See page 2760 of the record and Appellee's Appendix, p. 9(a)-10(a). (c) Nowhere in the 10 assignments of alleged errors set out in Appellant's petition for an appeal and supersedeas filed by it in the Supreme Court of Appeals of West Virginia is there any mention of the alleged violation of Appellant's constitutional rights, either state or federal. Appendix, p. 4(a)-5(a).

F. The cases cited on page 3 of Appellant's Jurisdictional Statement do not sustain Appel-

lant's contention that it is entitled to have its appeal heard by this Court.

2. The appeal does not present a substantial federal question, for:

A. Procedural rules of a court, whether trial or appellate, to regulate and govern the orderly transaction of its business do not contravene the Fourteenth Amendment to the Constitution of the United States. Appeals are wholly matters of statute and are left to the Congress and legislatures of the various states.[1] Appeals to an appellate tribunal must conform to both applicable statutory provisions and the particular court's rules governing appeal.

3. The federal question sought to be reviewed was not timely raised, for:

A. Appellant's petition to the Supreme Court of Appeals of West Virginia for an appeal from the May 10, 1967 ruling of the Circuit Court of Kanawha County, West Virginia, presented no federal question. Appendix, p. 4(a)-5(a).

B. The said petition did not claim that the trial court had violated any of Appellant's constitutional rights. Appendix, p. 4(a)-5(a).

4. The federal question sought to be raised was not expressly passed on by the Supreme Court of Appeals of West Virginia:

A. Since the Supreme Court of Appeals of West Virginia dismissed the appeal to it for

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[1]28 U.S.C.A. Judiciary and Judicial Procedure; Michie's West Virginia Code, Volume 16, Chapter 58, Appeal and Error.

failure of Appellant to comply with the statutes of West Virginia and the Rules of the West Virginia Supreme Court governing the time within which appellant was required to file its bond on the conditional appeal allowed by the West Virginia Supreme Court in its order of September 11, 1967, the Supreme Court of Appeals has not expressly passed on any of the questions presented to it in appellant's application for appeal. Appellant's Appendix, p. 1-a.

5. The judgment of the Supreme Court of Appeals of West Virginia rests on an adequate non-federal basis, for:

A. Procedural rules of all appellate courts, including the Supreme Court of the United States, require litigants presenting grievances to conform to the practice and procedure set out in the statutes and rules of the court governing the same.[2] Accordingly, the West Virginia Supreme Court of Appeals has held that the posting of a bond within the required time is necessary to establish the court's jurisdiction. As recent as 1966, this position has been reaffirmed.[3] Also, Appellant failed to comply with the order of the Supreme Court of Appeals of West Virginia of

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[2]Deena Products Co. v. United Brick & Clay Workers of America, C.A. 6th 1952, 195 F. 2d 612. Certiorari denied. 73 S. Ct. 21, 344 U. S. 833, 97 L. ed. 640.

28 U.S.C.A. Supreme Court Rules.

28 U.S.C.A. Federal Rules of Civil Procedure.

Michie's West Virginia Code, Volume 16, Chapter 58, Appeal and Error.

[3]Scott v. Coal & Coke Railway Co., 70 W. Va. 777, 74 S. E. 992.

State v. Legg (1966), 151 W. Va. 401, 151 S. E. 2d 215.

Boggs v. Settle (1965), 150 W. Va. 330, pt. 1. syl., 145 S. E. 2d 446.

September 11, 1967. The statutory bond requirement is mandatory and jurisdictional, and cannot be waived.[4]

6. An appellate court is the final arbitrator of its rules.[5]

7. The West Virginia statutory provisions governing the conditions and time for filing bonds, when required by orders of the West Virginia Supreme Court of Appeals (Michie's West Virginia Code, Chapter 58, Article 6, Sections 14 and 16) do not violate any provision of the United States Constitution.[6]

The appeal should be dismissed for want of a substantial federal question, or, alternatively, the order appealed should be summarily affirmed as fully consonant with the United States Constitution. If the Jurisdictional Statement be deemed an application for writ of certiorari, it should be denied.

A. Federal basis for court determination cannot be predicated on a motion for rehearing, or a motion to reverse the decision of the state appellate tribunal.

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[4]4A C.J.S. Appeal & Error—Sec. 572.
Scott v. Coal & Coke Railway Co., 70 W. Va. 777, 74 S. E. 992.
Glidden v. Aetna Casualty Co. (Tex. 1956) 291 S. W. 2d 315.

[5]John v. Paullin, 58 L. ed 381; 231 U. S. 583 (1913).
28 U.S.C.A. Supreme Court Rules.
28 U.S.C.A. Federal Rules of Civil Procedure.

[6]Deena Products Co. v. United Brick & Clay Workers of America, C. A. 6th 1952, 195 F. 2d 612. Certiorari denied. 73 S. Ct. 21, 344 U. S. 833, 97 L. ed. 640.
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Hartford Life Ins. Co. v. Johnson (Mo. 1919), 39 S. Ct. 336, 249 U. S. 490, 63 L. ed. 722.

B. If so, every losing litigant can by such motion, after a ruling by the state appellate court, present a justiciable federal basis on claiming his federal constitutional rights were violated, and completely inundate this Court by such unjustified appeals.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed.

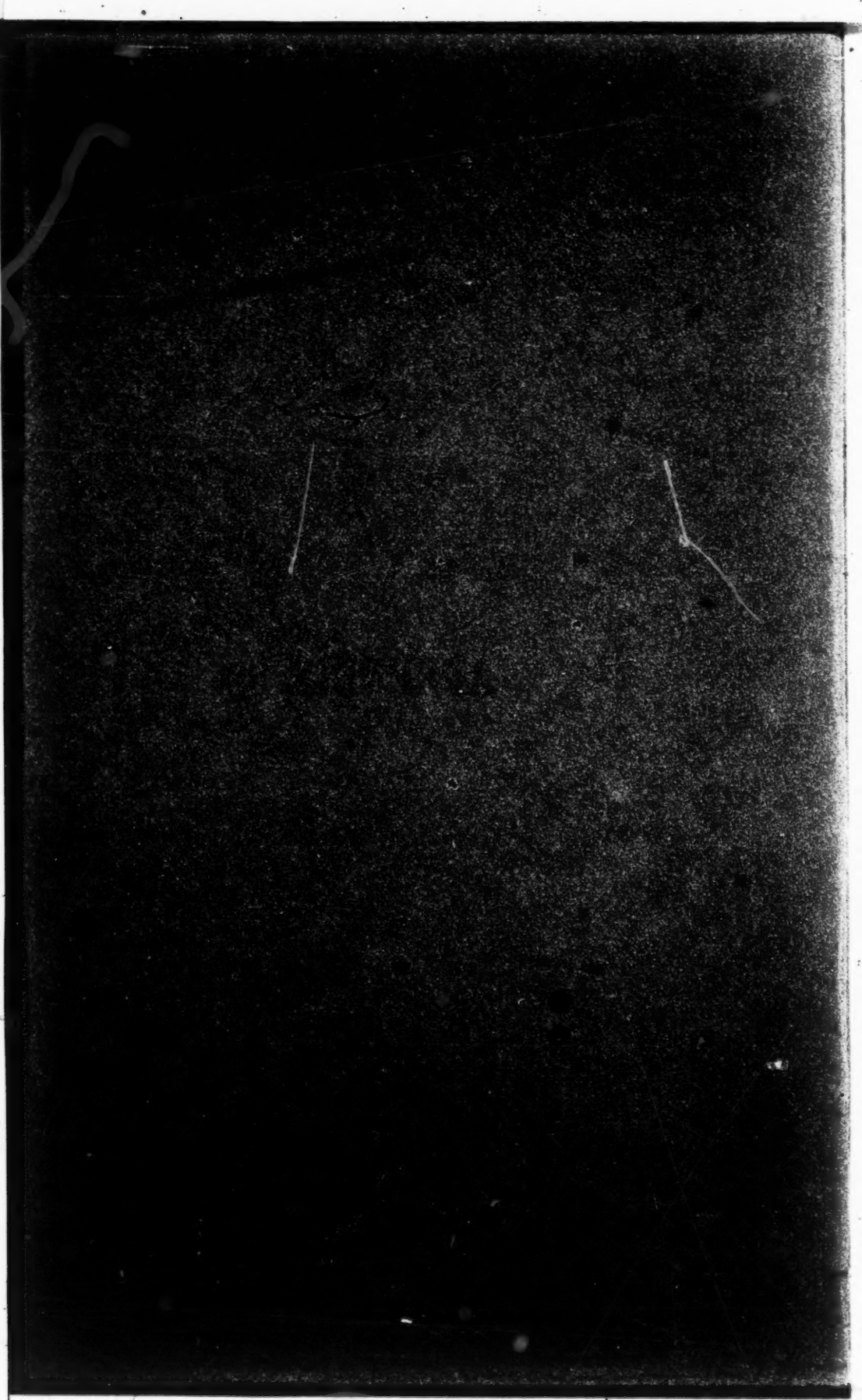
Respectfully submitted,

ROBERT H. C. KAY
511 Charleston National
Bank Building
Charleston, West Virginia

STANLEY E. PREISER
1012 Kanawha Boulevard, East
Charleston, West Virginia
Counsel for Appellee

JOHN S. HAIGHT
511 Charleston National
Bank Building
Charleston, West Virginia

GEORGE S. SHARP
511 Charleston National
Bank Building
Charleston, West Virginia
Of Counsel



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This 10th day of May, 1967, came the plaintiff by Stanley E. Preiser and John S. Haight, his attorneys, and came Chemical Tank Lines, Inc., a corporation, by J. Campbell Palmer III, its attorney.

The Court having maturely considered the Petition of Chemical Tank Lines, Inc., a corporation, for a Writ of Error or an Appeal, is of opinion to and doth hereby refuse to grant said Writ of Error or an Appeal upon the grounds that the judgment of the Court of Common Pleas was plainly right, for reasons set out in the Court's letter memorandum of opinion dated March 2, 1967, a copy of which is ORDERED to be filed and made a part of this Order.

And the defendant, Chemical Tank Lines, Inc., a corporation, having advised the Court and counsel of its desires and intentions to seek a Petition for an Appeal or Writ of Error from the Supreme Court of Appeals, did move the Court that a stay of execution be granted for a period of 120 days.

And the Court having maturely considered of said motion, does hereby ADJUDGE and ORDER that a stay of execution be granted the defendant for a period of sixty (60) days from the entry of this Order within which time the said Chemical Tank Lines, Inc. may apply to the Supreme Court of Appeals for an Appeal or Writ of Error; provided said Chemical Tank Lines, Inc., a corporation, does give proper and lawful a security for costs by giving to the Clerk of this Court a bond in the amount of $5,000.00, properly executed and with good and lawful security therefor.

And the defendant having heretofore tendered for filing its Petition for Appeal or Writ of Error, Second

Application, together with accompanying Brief which was not acted upon by the Court, does again tender its Petition for Appeal or Writ of Error, Second Application, together with accompanying Brief, which said Petition is by the Court ORDERED refused.

ORDER

ENTER: /s/ FRANK L. TAYLOR
Judge

APPROVED:

/s/ JOHN S. HAIGHT
Counsel for Plaintiff

/s/ J. C. PALMER, III
Counsel for Defendant

STATE OF WEST VIRGINIA,

At a Circuit Court for Kanawha County held at the Court House thereof on the 10th day of May, 1967.

SUSPENDING BOND

TRESPASS ON THE CASE NO. 9282 C. P. Law

KNOW ALL MEN BY THESE PRESENTS:

That we, J. Campbell Palmer, III, Responsible person for Chemical Tank Lines, Inc., Principal and Seaboard Surety Company, Surety, are held and firmly bound unto the State of West Virginia and Edward W. Holstine, in the just and full sum of Five Thousand Dollars ($5,000.00) to the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally and firmly by these presents, sealed with our seals and dated this 10th day of May, 1967.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH

That Whereas, the above Chemical Tank Lines, Inc., a corporation desire to present a petition to the Supreme Court of Appeals of the State of West Virginia, for an Appeal or Writ of Error to a Judgment of the Circuit Court of Kanawha County, rendered on the 10th day of May, 1967, wherein Edward W. Holstine was the Plaintiff and Chemical Tank Lines, Inc., a corporation and Garland Brumfield was Defendants.

And the said Circuit Court has made an order suspending said Judgment for the space of Sixty (60) days; when the said Chemical Tank Lines, Inc., a corporation, shall give bond before the Clerk of said Court, in the penalty of $5,000.00 conditioned as provided by law in such cases;

Now therefore if the said Chemical Tank Lines, Inc., a corporation, shall well and truly pay all such damages as any person may sustain by reason of said suspension in case an Appeal or Writ of Error to such Judgment shall not be allowed and be effectual within the above specified time, then this obligation to be void; else to remain in full force.

/s/ J. CAMPBELL PALMER, III,
Attorney SEAL
J. CAMPBELL PALMER, III
Responsible Person for Chemical Tank Lines, Inc., a corporation, Principal SEAL
SEABOARD SURETY CO.,
Surety SEAL
/s/ By: R. E. CARSON SEAL
Attorney in fact

Signed, sealed and acknowledged before me and approved by me this 10th day of May, 1967.

/s/ LEWIS A. HATCHER, *Clerk*
Circuit Court of Kanawha
County, West Virginia

IN THE SUPREME COURT OF APPEALS
of
WEST VIRGINIA

EDWARD W. HOLSTINE,
Appellee, Plaintiff Below
v.
CHEMICAL TANK LINES, INC.,
a corporation,
Appellant, Defendant Below.

PETITION FOR APPEAL OR WRIT OF ERROR AND SUPERSEDEAS

TO THE HONORABLE JUDGES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA:

* * * *

ERRORS COMPLAINED OF

(1) The trial court erred in refusing to direct a verdict for the defendant, Chemical, or alternatively, in refusing to grant the defendant's motion for judgment, made pursuant to and within the time limits of R. C. P. 50 (b), and was sustained by the Circuit Court.

(2) In the alternative, the Courts below erred in refusing to grant defendant's motion to set aside the verdict of the jury and award it a new trial.

(3) The courts below erred in entering and sustaining judgment for the plaintiff against the defendant in the sum of $350,000.00.

(4) The Court erred in giving plaintiff's instruction No. 4 (T-1964), instructing the jury, as a matter of law, that the plaintiff, Holstine, was not an employee of Chemical and, therefore, the fact that Chemical was a subscriber to the West Virginia Workmen's Compensation Fund was no defense to the action.

(5) The trial court erred in giving plaintiff's instruction No. 12 as amended (T-1977, T-2066), which the trial court stated (T-1981) was tantamount to directing a verdict for the plaintiff, in that it held that the negligence of an employee of an independent contractor was not only attributable to, but was the actual negligence of the contractee. This erroneous action was presumptively sustained by the Circuit Court.

(6) The trial court erred in refusing all of the defendant's instructions (T-2000-2048), except an instruction No. 1 (T-2000) defining negligence, and an instruction No. 11 (T-2017) on the variance between physical facts and actual testimony, instruction No. 12 on credibility (T-2018), and instruction No. 33 (T-2053) that if the defendant was not guilty of negligence which proximately contributed to causing the accident, it was not liable. The Circuit Court erroneously approved.

(7) The trial court erred in refusing to grant the motions made by the defendant (T-2050, 2065) clarifying the positions of law.

(8) The trial court erred in its rulings of law on the admission and exclusion of evidence during the trial.

(9) The trial court grieveously erred in permitting counsel for the plaintiff to prepare and display before the jury during his closing argument a large written

chart of purported money damages, erroneous in fact, prejudicial in nature, and unsupported by competent evidence, and in refusing defendant's motion for a mistrial because of its thereof (T-2209). The Circuit Court erred in sustaining this.

(10) The amount of the verdict was grossly excessive, and was arrived at by prejudice, error and mistake.

PRAYER

WHEREFORE, Chemical Tank Lines, Inc., the defendant below, appellant herein, prays the Court that it be awarded an Appeal, if such be proper, or a Writ of Error, if such be proper, and in either event, be granted Supersedeas to the judgment below, and that this Court, after such award, review the case and grant defendant's motion for judgment under R. C. P. 50 (b), or again in the alternative, set aside the verdict of the jury and award to it a new trial.

Respectfully submitted,

J. CAMPBELL PALMER, III
Attorney for Appellant
300 Security Building
Charleston, West Virginia

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 11th day of September, 1967, the following order was made and entered, to wit:

Edward W. Holstine, Plaintiff Below, Appellee

vs. Trespass on the Case No. 9282

Chemical Tank Lines, Inc., a corporation, and Garland Brumfield, Defendants Below,

Chemical Tank Lines, Inc., a corporation, Appellant

On a former day, to-wit, June 27, 1967, came the petitioner, Chemical Tank Lines, Inc., a corporation, by J. Campbell Palmer, III, its attorney, and presented to the Court its petition praying for an appeal from and supersedeas to a judgment of the Circuit Court of Kanawha County rendered in this action on the 10th day of May, 1967, with the record therein accompanying the petition, and note of argument in support thereof, which being seen and inspected by the Court the appeal and supersedeas prayed for is granted, but it is not to take effect until the petitioner, or some person for it, shall have given before the Clerk of the Circuit Court of Kanawha County bond with good personal security in the penalty of FIVE HUNDRED THOUSAND Dollars, conditioned according to law.

A True Copy

Attest: KENNETH E. HINES
Clerk Supreme Court of Appeals

IN THE SUPREME COURT OF APPEALS
of
WEST VIRGINIA

EDWARD W. HOLSTINE,
Plaintiff, Appellee,
v. No. 12693
CHEMICAL TANK LINES, INC.,
a corporation,
Defendant, Appellant.

BRIEF

* * * *

One more matter of estoppel. On November 3, 1967, Mr. Preiser wrote Mr. Palmer that he was going to

file his motion to dismiss the appeal because it was untimely granted, and served notice on November 3 of his specific intention so to do.

Nothing was said as to why such grounds were to be made, although naturally, Mr. Palmer was generally advised in the premises. Had that motion been sustained by this Court, then the filing of the supersedeas bond and the $25,000 premium therefor would have been a useless gesture on the part of Appellant. We submit that the time within which the supersedeas bond could be entered into should and must be automatically extended until such time as the Court has disposed of that motion, because otherwise, the Appellant would have been required to do a useless and a very expensive thing.

We think it would ill become the Appellee to state that they had not filed such motion in good faith, as we are sure that they must have done, but if such motion were filed in good faith, then Appellee's counsel must have realized that if they were successful, there was no use for the Appellant to spend the $25,000 premium for the bond, as the bond would be useless.

Therefore, the filing of the Motion to Dismiss the Appeal as improvidently awarded, being construed to have been made in good faith, from the time the notice thereof was given to counsel for Appellant until this Court acts on the matter, there should and must be a suspension of the running of the time within which to file the supersedeas bond; otherwise, the Appellant, if the Court does sustain that good faith motion, would have been required to make an expenditure of a large sum of money; to-wit, $25,000, without any possible benefit therefrom. Since this action was performed by counsel for the Appellee, that is the Motion

made, then we think this Court should consider that the time for the filing of the supersedeas bond should be extended until that matter has been finally disposed of.

* * * *

IN THE CIRCUIT COURT
OF KANAWHA COUNTY, WEST VIRGINIA

EDWARD W. HOLSTINE,
Plaintiff,

v.

CHEMICAL TANK LINES, INC.,
a corporation,
Defendant.

Upon Appeal
Trespass on the
Case No. 9282

PETITION FOR WRIT OF ERROR OR APPEAL

To The Honorable Frank L. Taylor,
Judge of Said Court:

* * * *

ISSUES ARISING

The first issue before this Court will be whether this defendant was so protected by reason of it being a fully paid-up subscriber to the Workmen's Compensation Fund that judgment should be rendered in its behalf.

The second issue is whether the amount of the verdict is, supported by the evidence, so excessive as to cause this Court to set it aside for such reason.

Thirdly, the defendant will contend that there was, in fact, a directed verdict for the plaintiff so that the jury did not actually decide the issues raised at trial; hence, we will take the position throughout this appeal

that this Appellate Court should consider all of the facts, evidence and circumstances favorable to the defendant to determine if there should have been such a directed verdict for the plaintiff.

Next, we are contending that the issues were such that even we are not successful with all other points of error, the facts were in such dispute that they should have been submitted for jury determination and were not matters so clearly undisputed as to cause the court below to make decisions, as a matter of law, on all issues involved.

Lastly, errors in trial of case, which should be ruled upon if a new trial only were granted, so as not to be repeated at a subsequent trial.

* * * *

APPLICABLE SECTIONS OF THE CODE OF WEST VIRGINIA TO THIS APPEAL

Michie's West Virginia Code, Volume 16, Chapter 58, Article 5,

Section 4: TIME FOR APPEAL OR WRIT OF ERROR; NOTICE OF INTENT TO FILE PETITION IN CRIMINAL CASES TO BE FILED WITH CLERK STATING GROUNDS.

"No petition shall be presented for an appeal from, or writ of error or supersedeas to, any judgment, decree or order, whether the State be a party thereto or not, which shall have been rendered or made more than eight months before such petition is presented.

"In criminal cases no petition for appeal or writ of error shall be presented unless a notice of intent to file such petition shall have been filed with the Clerk

of the court in which the judgment or order was entered within sixty days after such judgment or order was entered. The notice shall fairly state the grounds for the petition without restricting the right to assign additional grounds in the petition."

Section 5: STAY OF PROCEEDINGS; SUPERSEDEAS BOND.

"At the instance of any person who desires to present such petition, the court, in which the judgment, decree or order is, may, during the term at which it is rendered or made, or the judge of such court may, within twenty days after such term is ended, upon notice in writing to the opposite party (in either case the court or the judge exercising a discretion), make an order suspending the execution of such judgment, decree or order, for a reasonable time to be specified in such order, when such person shall give bond before the clerk of such court, in such penalty as the court or judge may require, with a condition reciting such judgment, decree or order, and the intention of such person to present such petition, and providing for the payment of all such damages as any person may sustain by reason of such suspension in case supersedeas to such judgment, decree or order should not be allowed and be effectual within the time so specified."

Section 10: ALLOWANCE OF APPEAL OR WRIT OF ERROR OR SUPERSEDEAS; STAY OF PROCEEDINGS.

"The court or judge to whom a petition is duly presented, if of opinion that the decision complained of ought to be reviewed, may allow an appeal, writ of error or supersedeas, and may stay proceedings either in whole or in part."

Section 14: APPEAL BOND GENERALLY.

"Except when an appeal, writ of error or supersedeas is proper to protect the estate of a decedent, convict or insane person, the same shall not take effect until bond is given by the appellants or petitioners, or one of them, or some other person, in a penalty to be fixed by the court or judge by or in which the appeal, writ of error or supersedeas is allowed or entered with condition: If a supersedeas be awarded, to abide by and perform the judgment, decree or order of affirmance, and to pay to the opposite party, and to any person injured all such costs and damages as they, or either of them, may incur or sustain by reason of said appeal, in case such judgment, decree or order, or such part, be affirmed, or the appeal, writ of error or supersedeas be dismissed, and also, to pay all damages, costs and fees, which may be awarded against or incurred by the appellant or petitioners; * * * *."

Section 16: TIME FOR PRESENTING RECORD AND GIVING BOND.

"No process shall issue upon any appeal, writ of error or supersedeas allowed from or to a final judgment, decree or order, if, when the record is delivered to the clerk of the appellate court, eight months shall have elapsed since the date of such final judgment, decree or order; but the appeal, writ of error or supersedeas shall be dismissed whenever it appears that eight months have elapsed since such date before the record is delivered to such clerk, or that two months have elapsed since the date when the appeal, writ of error or supersedeas was granted before such bond is given as is required to be given before the appeal, writ of error or supersedeas takes effect."

APPLICABLE SECTIONS OF THE RULES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA TO THIS APPEAL

Michie's West Virginia Code, Volume 1, Rule III, Section 3:

BOND—DISMISSAL FOR FAILURE TO EXECUTE.

"If the appellant or plaintiff in error, except in criminal cases or other cases in which no bond is required, shall fail to execute bond before the circuit clerk within two months after allowance of the appeal or writ of error in this court, his appeal, or writ of error shall be dismissed. The procedure for such dismissal shall be as provided in Section 2 of Rule IV."

AGREEMENT OF COUNSEL.

"All agreements of counsel in regard to any case or matter pending in court shall be reduced to writing, signed by counsel and delivered to the clerk."